90-1646

No. -

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS B. CONNELL,
PETITIONER,

v.

BANK OF BOSTON AND JOHN S. INGALLS,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the First Circuit's requirement that a plaintiff, to survive a summary judgment motion in an ADEA action, must "rebut an employer's articulated reasons and also directly prove age discrimination is contrary to the express teaching of the Supreme Court."

Quoting from the dissenting opinion of the United States Court of Appeals for the First Circuit, January 28, 1991. (App. A-25.)[1]

[1] References to the opinions reprinted in the Appendix appear throughout the petition as "App." followed by the relevant page number of the Appendix.

PARTIES TO THE PROCEEDINGS

Petitioner—plaintiff-appellant below — is Thomas B. Connell.

Respondents—defendants-appellees below — are Bank of Boston and John S. Ingalls. The Bank of Boston is a wholly-owned subsidiary of The Bank of Boston Corporation; the common stock of The Bank of Boston Corporation is publicly traded.

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BANK OF BOSTON AND JOHN S. INGALLS,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Thomas B. Connell (the "Petitioner" or "Connell"), seeks a writ of certiorari to review an Opinion of the United States Court of Appeals for the First Circuit which affirmed the granting of Summary Judgment to Respondents Bank of Boston and John S. Ingalls (the "Respondents") on the Petitioner's claims brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 924 F.2d 1169 and is reprinted beginning at page A-1 of the Appendix.

The district court's opinion of January 5, 1990 granting the Respondents' motion for summary judgment under Fed. R. Civ. P. 56 is reprinted beginning at page B-1 of the Appendix.

JURISDICTION

The opinion of the court of appeals affirming in part the district court's decision was entered on January 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

The following statutes are the focus of this petition: 29 U.S.C. §§ 621-634, the Age Discrimination in Employment Act, ("ADEA"), and Fed. R. Civ. P. 56(c) which provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

The underlying action is an age discrimination suit filed by Petitioner Thomas B. Connell in the United States District Court for the District of Massachusetts against Respondents the Bank of Boston ("Bank") and Connell's supervisor, John S. Ingalls.

Connell, who at the time of his discharge was forty-seven years old and had worked for the Bank for twenty-three years, alleged, *inter alia*, that he was discharged effective June 30,

1986 because of his age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (App. A-2). Throughout his employment, including fourteen years in the Branch Banking Division and nine years in the Public Finance Division, Connell had received good performance evaluations. (App. A-5). In 1980, Connell became an officer of the Bank and, in April of 1982, was nominated for and received the designation of Assistant Vice President. (App. A-5). During his nine years in the Public Finance Division, Connell's performance evaluations as an officer varied from competent to commendable. (App. A-31).

On May 30, 1986, Ingalls telephoned Connell at home while Connell was on vacation. (App. A-17). Ingalls discussed with Connell a reorganization of the department and concluded the telephone conversation by saying that Connell would not fit into the future of the division. (App. A-17). The following day, Connell was told by telephone that his employment would end as of June 30, 1986. (App. A-17). He was told that he was being terminated because the reorganization of the Division would do away with his position. (App. B-2).

The Respondents moved for summary judgment in the action on two principal grounds: the reorganization of the Public Finance Division resulting in the elimination of the unit in which the plaintiff worked, and the plaintiff's "poor" work performance based on Ingalls' allegation that Connell had mishandled two important municipal accounts, one for the Town of Northbridge, Massachusetts and the other for the City of Lynn, Massachusetts. (App. A-7-8). In his affidavit in support of the motion, Ingalls stated that in March of 1986 "I was advised by the Treasurer of the City of Lynn, Bob McManus, that if Connell was returned to the City's account, the City would no longer use the Bank as its financial advisor." (App. A-8).

In opposition to the motion to dismiss, Connell submitted affidavits of Robert McManus, the Treasurer of Lynn, and

Cecelia C. Parker, the Treasurer-Collector of the Town of Northbridge. (App. A-9). Treasurer McManus stated in his affidavit: "I did not ever tell Mr. Ingalls, or any other Bank of Boston employee, that if Mr. Connell was assigned to the City of Lynn's account, I would move the account to another bank and I believe it is very unlikely that anyone would make that statement." (App. A-9). Treasurer-Collector Parker stated in her affidavit: "Tom Connell always did a commendable job working on the Town of Northbridge's finances. . . . Tom Connell had nothing to do with the delay of the Town of Northbridge's municipal bond issue at the end of 1985." (App. A-9-10).

The United States District Court for the District of Massachusetts ruled that "the plaintiff has not presented evidence which would permit a jury to conclude that the abolition of his job flowed from other than legitimate business considerations" (App. B-7), allowed the motion of summary judgment and dismissed the action on January 9, 1990.

On February 2, 1990, the Petitioner filed a timely Notice of Appeal with the Court of Appeals for the First Circuit. The court of appeals decision, affirming the district court in relevant part, was written by Circuit Judge Campbell, District Judge Torres (sitting by designation) concurred, and Senior Circuit Judge Bownes dissented, in relevant part. (App. A). The majority ruled that the plaintiff must show the employer had a discriminatory animus based on age. (App. A-4). In his dissent, Judge Bownes stated that the plaintiff, having rebutted the employer's articulated reasons or shown them to be pretextual, is entitled to have his claim of age discrimination determined by a trier of fact. (App. A-24-32).

REASONS FOR GRANTING THE WRIT

The issue before this Court is the proper standard to be applied in determining a plaintiff's burden in meeting a summary judgment challenge in an ADEA case.

Judge Bownes framed the question presented in this petition in his dissent from the opinion of the court of appeals. "The requirement that a plaintiff rebut an employer's articulated reasons and also directly prove age discrimination is contrary to the express teaching of the Supreme Court. All that is necessary to raise a genuine issue of material fact in an employment discrimination case is that the plaintiff make out a prima facie case and successfully rebut as pretextual the employer's articulated reasons for the adverse action.... I acknowledge that the majority has followed First Circuit precedent, but I believe that our precedent is contrary to the explicit teaching of *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981)." (App. A-25).

There are three primary reasons for granting the writ: (1) the First Circuit's ruling conflicts with the standard of the United States Supreme Court, (2) there is a split between the First Circuit's ruling and at least nine other Circuit Courts, and (3) the First Circuit's ruling is contrary to the Congressional intent in enacting ADEA.

A. Supreme Court Standard

The first primary reason for granting the writ is that the First Circuit's majority decision does not follow the teachings of this Court. The standard for summary judgment in an ADEA case as articulated by the First Circuit in this and earlier cases imposes a greater burden on plaintiffs than does the standard established by the Supreme Court of the United States. *Burdine*, supra; *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

This Court in *Burdine* amplified and explained the "shifting burdens" established in *McDonnell Douglas*, the seminal case on the order and allocation of proof in employment discrimination cases. Under the *Burdine* standard, a plaintiff may prove employment discrimination *either* by direct evidence of discrimination *or* by successfully rebutting the employer's articulated reasons for its actions. *Burdine*, 450 U.S., at 256. The First Circuit, however, does not allow plaintiffs to utilize this "explicit alternative method of proof as stated in *Burdine*." (App. A-28). Instead, the First Circuit increases the plaintiff's burden by requiring direct evidence of the employer's age animus to survive a motion for summary judgment.

Under the *McDonnell Douglas* standard, the plaintiff carries the initial burden of establishing a prima facie case. "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S., at 802. If the employer so articulates, the plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a discriminatory decision." *Id.* at 805.

In *Burdine*, this Court eliminated the very requirement of the additional proof that the majority in the First Circuit is imposing on Connell:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered ex-*

> *planation is unworthy of credence.* See *McDonnell Douglas*, 411 U.S. at 804-805.

Burdine at 256 (emphasis added). The First Circuit's standard conflicts with the explicit teachings of this Court.

B. Split in Circuits

The second primary reason for granting the writ is that the decision of the Court of Appeals for the First Circuit directly conflicts with the holdings of the court of appeals in the vast majority of the other circuits.

In at least nine of the thirteen circuits, the court of appeals has held that the *Burdine* alternative language means that making out a *prima facie* case and raising a genuine issue of fact that the articulated reason for the discharge was pretextual is sufficient, without more, to preclude summary judgment as to discrimination. *Ramseur* v. *Chase Manhattan Bank*, 865 F.2d 460, 464-65 (2d Cir. 1989) (summary judgment for employer reversed: "A showing that a proffered justification is pretextual is itself sufficient to support an inference that the employer intentionally discriminated."); *Fite* v. *First Tennessee Production Credit Ass'n*, 861 F.2d 884, 890-91 (6th Cir. 1988) (employer's motion for directed verdict properly denied because jury could have found that employer's reason for discharge was a mere pretext); *Samarzia* v. *Clark County*, 859 F.2d 88, 91-92 (9th Cir. 1988) (directed verdict properly denied; a reasonable jury could have concluded that employer's reasons were pretextual); *Overgard* v. *Cambridge Book Co.*, 858 F.2d 371, 375-76 (7th Cir. 1988) (plaintiff may prevail in one of two ways: either by directly proving that employer was more likely motivated by a discriminatory reason or by indirectly demonstrating that defendant's proffered reason for the termination is not credible. "If the plaintiff can convince the trier of fact that the defendant did not act

for the reason it offers as justification, then the defendant has not met its burden and the plaintiff may thus prevail."); *MacDissi* v. *Valmont Industries, Inc.*, 856 F.2d 1054, 1057-59 (8th Cir. 1988) ("As a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred."); *Carden* v. *Westinghouse Elec. Corp.*, 850 F.2d 996, 1000 (3d Cir. 1988) ("A showing that a proffered justification is pretextual is itself equivalent to finding that the employer intentionally discriminated"); *Sparks* v. *Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1562-64 (11th Cir. 1987) (summary judgment for employer reversed; employee raised a genuine issue of material fact as to whether employer's articulated reason for discharge was pretextual); *Thornbrough* v. *Columbus and Greenville R. Co.*, 760 F.2d 633, 646 (5th Cir. 1985) ("In the context of a summary judgment proceeding, the question is not whether the plaintiff proves pretext but rather whether the plaintiff raises a genuine issue of fact regarding pretext."); *Krodel* v. *Young*, 748 F.2d 701, 707-08 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985) (At the very least, *Burdine* and *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711 (1983) "make clear that an ADEA plaintiff who has established a *prima facie* case and has effectively discredited the employer's proffered justification need not, in all cases, submit additional evidence concerning the particular employment decision at issue in order to demonstrate that age was a determining factor in the employer's action.")

The Court of Appeals for the Fourth Circuit seems to be in the minority of Circuit Courts in following the "additional" evidence test: "If the presumption is rebutted, the burden of production returns to the plaintiff to show that the defendant's proffered nondiscriminatory reasons are pretextual and that the employment decision was based on a sexually discrim-

inatory criterion." *Spencer* v. *General Elec. Co.*, 894 F.2d 651, 659 (4th Cir. 1990). *Spencer*, however, was decided after trial, not on summary judgment. Hence, the plaintiff in that case was given the opportunity to prove his case at trial, an option denied under the rule followed by the First Circuit.

The First Circuit thus appears to stand alone in imposing an extra burden of proof on a plaintiff who seeks to avoid summary judgment. Notably, neither of the Judges who form the majority in the First Circuit refers to a single court of appeals case outside the First Circuit.

C. Congressional Purpose

The third primary reason for granting the writ is that the standard applied by the First Circuit is contrary to the Congressional purpose in enacting the ADEA.

Twenty-four years ago, finding age discrimination in our society to be pervasive, Congress enacted the ADEA to prohibit arbitrary discrimination based on age in employment. *See* 29 U.S.C. § 621(b). To meet the challenge, Congress borrowed aspects of Title VII of the Civil Rights Act of 1964 to ensure broad effective enforcement of ADEA. *Lorillard* v. *Pons*, 434 U.S. 575 (1978).

The ADEA is a hybrid statute, containing prohibitions similar to those in Title VII and incorporating certain procedural provisions of the Fair Labor Standards Act, ("FLSA"), 29 U.S.C. §§ 201-219. *Lorillard* v. *Pons*, 434 U.S. at 584. Congress did more than merely borrow the most advantageous aspects of the FLSA and Title VII in designing the ADEA, however. Instead, Congress purposefully created remedial provisions broader than the FLSA or Title VII to ensure effective enforcement of the ADEA. Thus, in reviewing a decision involving summary judgment in an ADEA case, courts should apply a standard that supports, rather than frustrates, the Congressional purpose of combating discrimination against older persons.

The standard used by the First Circuit Court of Appeals, which places an additional burden on the plaintiff in order to survive a motion for summary judgment, is contrary to the congressional purpose and in sharp contrast to this Court's conclusions concerning the remedial and procedural provisions of the ADEA.

CONCLUSION

This case presents an important legal question regarding the standard for withstanding a motion for summary judgment in an ADEA case. The petitioner faces a heavier burden in defeating such a motion in the First Circuit than he would in the court of appeals in at least nine of the other federal circuits. The Supreme Court of the United States now should intervene to decide whether the First Circuit ought to be following this Court's standard as set forth in *Burdine*, or whether it may, *sua sponte*, impose another hurdle for an ADEA plaintiff to clear.

Respectfully submitted,

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APRIL 26, 1991

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 90-1160

THOMAS B. CONNELL,
PLAINTIFF, APPELLANT,

v.

BANK OF BOSTON AND JOHN S. INGALLS,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. A. DAVID MAZZONE, *U.S. District Judge*]

Before
CAMPBELL, *Circuit Judge*,
BOWNES, *Senior Circuit Judge*,
and TORRES,* *District Judge*.

Edward N. Perry with whom *Perkins, Smith & Cohen* were on brief for appellant.

Scott C. Moriearty with whom *Marianne Meacham* and *Bingham, Dana & Gould* were on brief for appellees.

JANUARY 28, 1991

* Of the Distirct of Rhode Island, sitting by designation.

CAMPBELL, *Circuit Judge.* This is an appeal in an age discrimination case by plaintiff-appellant Thomas B. Connell from a summary judgment in favor of plaintiff's employer the Bank of Boston, and John S. Ingalls, the bank official who discharged plaintiff.

The complaint had five counts: Count I alleged that plaintiff was discharged effective June 30, 1986, because of his age in violation of 29 U.S.C. § 623; Mass. Gen. L. ch. 149, § 24A, and Mass. Gen. L. ch. 151B; Count II alleged discrimination based on retaliation; Count III alleged willful age discrimination in violation of 29 U.S.C. § 626(d)[1] (1976); Count IV alleged breach of implied contract for fringe and pension benefits; and Count V alleged the intentional infliction of emotional distress.

The district court found that "the plaintiff has not presented evidence which would permit a jury to conclude that the abolition of his job flowed from other than legitimate business considerations." It therefore granted summary judgment on Counts I, II and III. It dismissed Counts IV and V on the basis of "persuasive authority." No appeal has been taken from the dismissal of Counts IV and V.

STANDARD OF REVIEW

A. *Summary Judgment Generally*

Fed. R. Civ. P. 56(c) is the starting point. It provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

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[1] The reference to (d) appears to be a mistake; 29 U.S.C. § 626(d) has to do with filing charges with the EEOC.

The words "genuine issue of material fact" have been judicially refined and defined:

> By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.
>
> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). This teaching was reiterated in *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986):

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Id. at 322. *See also Medina-Munoz* v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990); *Hebert* v. *Mohawk Rubber Co.*, 872 F.2d 1104, 1106 (1st Cir. 1989).

B. *Summary Judgment In An ADEA Case*

In the absence of direct evidence of age discrimination, as is the case here, an ADEA plaintiff in a discharge case must clear

two hurdles. He must first produce evidence establishing a *prima facie* case. This hurdle has several requirements. Plaintiff must show:

> 1. He was within the protected age group, that is 40-70 years of age;[2]
> 2. He was performing his job at a level that met his employer's legitimate expectation; and
> 3. He was replaced by someone with roughly similar qualifications.

Medina-Munoz v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8-9 (1st Cir. 1990); *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1011 (1st Cir. 1979).

If a *prima facie* case is made, the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for plaintiff's discharge. The articulation of such a reason nullifies the inference raised by the *prima facie* case. *See Medina-Munoz*, 896 F.2d at 9; *Menard* v. *First Sec. Services Corp.*, 848 F.2d 281, 285 (1st Cir. 1988). Plaintiff must then clear the second hurdle by showing that the employer's articulated reasons were only a pretext for age discrimination. The plaintiff is required to "do more than simply refute or cast doubt," on the employer's rationale. He must "also show a discriminatory animus based on age."[3] *Medina-Munoz*, 896 F.2d at 9. The key question becomes whether the employer fired plaintiff because of his age. *Id.* We do not second-guess the business decisions of an employer. *Rossy* v. *Roche Products, Inc.*, 880 F.2d 621, 625 (1st Cir. 1989).

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[2] When *Hebert* v. *Mohawk Rubber Co.*, 872 F.2d 1104 (1st Cir. 1989) was decided, the protected class was defined as those individuals who are at least 40 years of age but less than 70 years of age. The maximum age limitation of 70 was removed in the Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592 (Oct. 31, 1986), effective Jan. 1, 1987.

[3] We do not suggest that the plaintiff must, necessarily, offer affirmative evidence of age animus in addition to rebutting the employer's evidence. Rather, the evidence as a whole, whether direct or indirect, must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by age animus.

With these principles as our guide, we now turn to the facts, viewing them in the light most favorable to the plaintiff, the party opposing the motion, and indulging all inferences favorable to him. *Oliver* v. *Digital Equipment Corp.*, 846 F.2d 103, 105 (1st Cir. 1988).

THE FACTS

A. *Prima Facie Case*

Plaintiff was forty-seven years old when he was discharged by the Bank. This puts him within the age category covered by the ADEA. 29 U.S.C. § 631(a). He thus has met the first requirement for a *prima facie* case.

We turn to the next requirement, that he was performing his job at a level that met the Bank's legitimate expectations. Plaintiff started working for the Bank in 1963 as a teller in the Branch Division. He remained in this division for fourteen years, serving as head note teller at the Kenmore Square branch for seven years and teller-in-charge at the South Boston branch for more than two years. His job evaluations during his time as a teller can fairly be described as fair to good. There is no indication that he was considered an outstanding employee. We need not go into the details of plaintiff's work evaluations during his time as teller because it is the appraisals of his work in the Municipal Finance Unit of the Public Finance Division, where he was employed when he was discharged, that are pertinent.

In 1977 plaintiff was transferred, presumably at his own request because of better promotion opportunities, to the Municipal Finance Unit. He became an officer of the Bank in 1978 and an assistant vice-president in 1982. His performance as an officer was rated as competent. The officers' job performances were rated in accord with a scale: 1 (Unsatisfactory); 2 (Fair); 3 (Competent); 4 (Commendable); and 5 (Distinguished). In an Officer Performance Appraisal dated Novem-

ber 2, 1981, he received an overall performance rating of 3 (Competent). This was followed by an Officer Performance Appraisal dated November 23, 1982, of 4 – . The next Officer Performance Appraisal, dated November 28, 1983, gave him an overall performance rating of 3 + . He received the same score on the appraisal of November 2, 1984. Plaintiff received a 3 rating in the next appraisal dated September 11, 1985. This is the last job evaluation appraisal in the record.[4] Viewing the facts in the light most favorable to plaintiff, we find that he has met the second requirement for a *prima facie* case: he was performing at a level that met the Bank's legitimate expectations; he was never rated less than a competent bank officer.

The final requirement for making a *prima facie* case is that he was replaced by someone with qualifications similar to his own. This is perhaps arguable, since the Municipal Finance Unit in which plaintiff served was disbanded. However, plaintiff presented evidence that after the date of plaintiff's termination, June 30, 1986, two people, both younger than plaintiff, were hired and placed in the Public Merchant Banking Unit which ostensibly took on the functions of the Municipal Finance Unit. Viewing the record most favorably to plaintiff, we believe he sufficiently established the third prong of a *prima facie* case.[5] The Bank, in any event, as described below, countered by articulating a legitimate non-discriminatory reason for his discharge. By so doing, the Bank nullified any discriminatory inference raised by the *prima facie* case and left as the sole dispositive question, the

[4] We realize that plaintiff disagreed with many of his ratings and some negative written comments in the job performance appraisals. It is not our function, however, to evaluate the job appraisals where there is no eveidence that they were motivated or slanted by age animus.

[5] In cases involving force reductions, this court has suggested that, as an alternative to showing replacement by a similarly qualified person, a plaintiff may establish a *prima facie* case by showing "the employer did not treat age neutrally or that younger persons were retained in the same position." *Hebert* v. *Mohawk Rubber Co.*, 872 F.2d 1104, 1111 (1st Cir. 1989).

following: Has plaintiff raised a genuine factual issue concerning whether the Bank's articulated reason was but a pretext for age discrimination?

B. *The Bank's Articulated Reasons for Plaintiff's Discharge*

On February 3, 1986, John S. Ingalls, age 36, was appointed managing director of the Public Finance Division of the Bank. Shortly after Ingalls took command, Carol Stevens Eno, the manager of the Municipal Finance Unit in which plaintiff worked, recommended to Ingalls that the unit be abolished bacause of its failure to show a profit and its discouraging prospects. Two new laws reduced the unit's major sources of revenue: Mass. Gen. L. ch. 44, § 55B prohibited municipalities from depositing funds in non-interest bearing accounts; and the 1986 Federal Tax Reform Act imposed substantial new restrictions on the issuance of general obligation bonds.

In his affidavit and deposition, Ingalls gave two principal reasons for plaintiff's discharge. After receiving Eno's recommendation, Ingalls eliminated the Municipal Finance Unit and set up a new one, the Municipal Financial Advisory Sources Unit. He also made other organizational changes. Five municipal account officers were involved in the elimination of the unit in which plaintiff worked: Kelvin Brooks, Allan Totsi, Gerald Mecca, Stephen Knight and the plaintiff. Ingalls compared the relative performance of each and found Connell to be the weakest. Plaintiff disputes this, but the peformance ratings bear Ingalls out except as to Mecca, who had the same rating as plaintiff but more favorable comments. Ingalls also knew that Eno did not have a favorable view of plaintiff's work. Plaintiff had disagreed with Eno's latest appraisal of his work and refused to agree to the goals Eno had established for him. Eno informed plaintiff that he should rethink his position and agree to the goals or resign. She wrote a memo to Ingalls

on March 28, 1986 informing him of the situation, stating *inter alia*, "it is very important that you back me up."

Ingalls believed that plaintiff had mishandled two important municipal accounts, one for the town of Northbridge and the other for the city of Lynn. In his affidavit, Ingalls stated that in March of 1986: "I was advised by the Treasurer for the city of Lynn, Bob McManus, that if Connell was returned to the City's account, the City would no longer use the Bank as its financial advisor."

For these reasons Ingalls decided to discharge plaintiff and transfer the four other officers to different positions in the Bank. Brooks was assigned to the Public Merchant Banking Unit, Totsi and Mecca went to the newly formed Municipal Financial Advisory Services Unit, and Knight was transferred to the newly formed Government Banking Unit. As noted, all of these employees were younger than plaintiff. Another employee in the eliminated unit, John Nicolosi, age 32, was discharged. Eno, who was also younger than plaintiff, left the Bank's employ in September 1986 after helping with the transition and reorganization ordered by Ingalls. It is not clear from the record whether Eno left of her own volition or was discharged. We also note that Ingalls and the Bank parted company in June of 1988.

In his affidavit, Ingalls stated that no one replaced plaintiff as a municipal account officer and that no one was hired to replace either Nicolosi or Eno. Ingalls was emphatic in both his disposition and affidavit that plaintiff's age was not a factor in his discharge.

Thus, the Bank articulates two related reasons for plaintiff's discharge: the reorganization of the Bank resulting in the elimination of the unit in which plaintiff worked and plaintiff's poor performance relative to his peers, particularly in regard to his work as a municipal account officer.

C. *Plaintiff's Rebuttal Evidence*

1. *Plaintiff's Performance*

In rebuttal to the statements in Ingalls' affidavit that plaintiff had mishandled two important municipal accounts, — for the town of Northbridge and the city of Lynn — and that the treasurer of Lynn had told Ingalls that it would not do business with the Bank anymore if plaintiff handled Lynn's account, plaintiff submitted two affidavits. Robert McManus, treasurer of Lynn stated:

> 1. I am the Treasurer of the City of Lynn.
> 2. While I have been Treasurer of the City of Lynn, the City of Lynn has had an account with the Bank of Boston as well as other Banks.
> 3. I did not ever tell Mr. Ingalls, or any other Bank of Boston employee, that if Mr. Connell was assigned to the City of Lynn's account, I would move the account to another bank and I believe it is very unlikely that anyone would make that statement.

The Treasurer-Collector of the Town of Northbridge, Cecelia C. Parker, stated in her affidavit:

> 1. I am the Collector of the Town of Northbridge, Massachusetts, and in 1985, I was the Treasurer-Collector of the Town of Northbridge.
> 2. In 1985, I retained the Bank of Boston to handle municipal bond issues because of Mr. Tom Connell.
> 3. As Treasurer-Collector of the Town of Northbridge, I would have been aware of any problems the Town had with the Bank of Boston, and in particular Thomas Connell's handling of the Town's financing.

4. Tom Connell always did a commendable job while working on the Town of Northbridge's finances.

5. Tom Connell had nothing to do with the delay of the town of Northbridge's municipal bond issue at the end of 1985.

There are also two letters in the record, one from the town treasurer of Wilmington and the other from the Bristol County Treasurer thanking plaintiff for services he rendered and commending him for his work.

2. *Reorganization*

It is undisputed that changes in federal and state laws had made the Municipal Finance Unit unprofitable and that a reorganization occurred pursuant to which the unit was eliminated. Furthermore, at least one other individual besides Connell (Nicolosi, age 32) lost his job as a result of the reorganization. No evidence exists that another Bank officer was created or hired to replace plaintiff. Rather the remaining officers who were not fired seem to have split up plaintiff's work, with staff help. To be sure, while the Municipal Finance Unit was eliminated, most of its functions were carried on and all of the original five officers except plaintiff were retained in one or another capacity. In his deposition, Ingalls testified, "[we] did not cease to perform any particular function as a result of the reorganization." This is not a situation where, as Eno had recommended, the unit and the functions it performed were entirely eliminated. Still, plaintiff's ratings were below all the others except Mecca, and Mecca had more favorable comments than plaintiff.

3. *Age Animus*

Besides rebutting an employer's proffered reasons for firing a plaintiff, the evidence must ultimately be sufficient to

permit the factfinder reasonably to infer that plaintiff was fired because of his age.[6] Proof along these lines need not be of the "smoking gun" variety and, in some factual settings, the mere showing of the falsity of the employer's stated reasons may, along with the other facts and circumstances in the case, give rise to a reasonable inference of age discrimination. But this is not a matter that can be addressed by formula. For a plaintiff to prevail on his ultimate burden, the totality of the circumstances must in each case create a reasonable inference that the employer's stated reasons were *a pretext for unlawful [age] discrimination*. *Burdine*, 450 U.S. at 256. The inference of intentional age discrimination must rest on more than speculation and conjecture. *See Dea* v. *Look*, 810 F.2d 12, 17 (1st Cir. 1987) (holding the plaintiff could not survive summary judgment merely by presenting his own version of the reasons behind the employment decision).

In order to make such a showing here, plaintiff points to the Bank's exploration, consideration and ultimate rejection of an early retirement program for its employees. The exploration of an early retirement program started at about the same time that two consulting firms, McKinsey & Company and Booz-Allen & Hamilton, were hired to study the Bank's organizational and management structure with an eye to reducing costs and increasing productivity. We do not see how the Bank's mere consideration of an early retirement program, followed by its eventual rejection, is itself proof of age animus vis a vis plaintiff. Nor do the management studies on productivity and cost reduction, without more, prove age animus. However, in support of his contention that the reorganization was motivated by age animus, plaintiff also offers the affidavits of two bank officials.

John B. Ellington, a vice-president who worked in the Bank's

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[6] As the Supreme Court noted in *Burdine*, "[t]his burden [of production] now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." 450 U.S. 248, 256.

Employment Relations/Human Resources Office, stated in an affidavit:

> 1. From June, 1979 through January, 1987, I was an Assistant Vice President/Vice President of the Bank of Boston working in the Employment Relations/Human Resources Office.
>
> 2. During the period from 1984 through 1986, as part of my responsibilities in the Human Resources area, I tracked employees being terminated by the Bank of Boston.
>
> 3. Between 1984 and 1986, the Bank of Boston terminated at least 95 employees, more than 75% of whom were over 40 years of age.
>
> 4. During 1982 through 1986, I am aware that the Bank of Boston was studying early retirement proposals in order to enable people who were with the Bank of Boston for a considerable length of time to retire early.
>
> 5. The Bank of Boston never adopted any early retirement program to my knowledge, but many individuals who would have been covered by such a program were separated as a result of reorganizations.

Ellington's deposition testimony indicated that, in 1984 and 1985, the Bank was looking to see "if there were ways we could accomplish the same work with fewer people." The Bank was overstaffed and had higher salary costs and more people than other similar organizations. A reorganization plan was, therefore, put into effect. Many employees were terminated due to the reorganization of the Bank. Of the 80 to 100 employees that Ellington knew were to be discharged, he believed that there were more between the ages of 45 to 50 than below.

Curtis G. Browne, an officer at the bank, stated in an affidavit:

1. I have personal knowledge of the facts set forth herein.

2. I worked for the Bank of Boston for thirty-three (33) years from 1954 through 1987, and became a Corporate Service Officer, one of the more senior Bank employees.

3. In about 1982, I began to hear that the Bank management wanted to revitalize the Bank.

4. Shortly thereafter, consultants from McKinsey & Company, Inc. and/or Booz-Allen visited divisions of the Bank and spoke with many of the employees of the Bank.

5. Also beginning in about 1982, I began hearing about early retirement programs that were being developed and considered by the Bank.

6. By 1984 and 1985, I knew that early retirement proposals were being considered and that various options being considered covered different age groups.

7. I know that while I was employed by the Bank none of the early retirement proposals were ever adopted and that the Bank determined to eliminate more of the senior employees through other methods of reduction in force.

8. Beginning in about 1984, the Bank began to reorganize a number of departments within many of the divisions of the Bank and, with each reorganization, I was aware that some older Bank employees were being terminated.

9. I know that the more senior Bank employees were frequently terminated in the "reorganizations" and there were fewer "old timers" in the Bank by the time I retired.

As noted, the plaintiff bears the burden of proving that the Bank intended to discriminate against plaintiff because of his age. Since intent is a "pure question of fact," *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-88 (1982), the issue we must consider is "whether the plaintiff could prevail if a jury

or judge believed plaintiff's version of the facts and disbelieved defendant's version." *Stepanischen* v. *Merchants Dispatch Transportation Corp.*, 722 F.2d 922, 928 (1st Cir. 1983).

Applying this standard, we agree with the district court that plaintiff's evidence is not sufficient to permit an inference of age discrimination. Although plaintiff's evidence concerning the municipal accounts may be sufficient to rebut the Bank's assertion that he was dismissed due to his poor performance on those particular accounts, he has not offered any evidence to show that the bank's other reason, his relatively lackluster performance evaluations, was pretextual. Moreover, even if plaintiff's evidence were sufficient to rebut the bank's stated reasons for his dismissal, the evidence overall has to be sufficient for a factfinder reasonably to infer that the Bank's actions were motivated by age animus. We do not think that the plaintiff has met that burden here.

Plaintiff relies principally on the affidavits of Ellington and Browne in order to show age animus. Affiant Ellington states that "between 1984 and 1986, the Bank of Boston terminated at least 95 employees, more than 75% of whom were over 40 years old." Standing alone, this statement could constitute significant evidence of age animus. However, the Bank submitted an affidavit from the Director of the Bank's Human Resources Information Systems (the "Lauer affidavit"), stating that between 1984-86, over 900 Bank employees were terminated of whom less than 17% were over 40. Connell has not disputed the accuracy of the Bank's figures nor has he explained how the admittedly incomplete sample discussed in the Ellington affidavit is statistically relevant.

The Lauer affidavit does not indicate the percentage of employees over 40 in the full-time workforce at the Bank. Thus, it does not establish that the Bank did not terminate older employees at a disproportionate rate. The Bank, however, does not bear the burden of proving that it did not discriminate. Rather, Connell must prove that it did. By

demonstrating that the sample in the Ellington affidavit represents only a small subset of the total number of employees terminated, the Lauer affidavit casts substantial doubt on the relevance of the Ellington sample — a point which Connell has made no effort to explain. Consequently, we agree with the district court that the probative value of the Ellington affidavit must be discounted.

Unlike the Ellington and Lauer affidavits, the Browne affidavit offers no statistical information concerning the termination of older employees. Rather, Browne simply states that the Bank had been considering an early retirement program, that no such program had been adopted, that some older employees were terminated through reorganizations, and that there were fewer "old timers" in the bank when he retired. Perhaps the strongest indication of age amimus would be Browne's stated opinion that "the Bank determined to eliminate more of the *senior* employees through other methods of reduction in force." (Emphasis supplied.) However, nowhere does Browne point to facts buttressing this broad assertion or explaining how Browne learned of the Bank's intentions to eliminate seniors. Browne himself is described simply as "a Corporate Service officer, one of the more senior Bank Employees." It is not indictated that he participated in meetings where Bank employment policies were made, that his responsibilities included making such policies, or that he had overheard the remarks of officers having such responsibilities. Nothing in his affidavit indicates the basis for his having discovered that "the Bank determined to eliminate more of the senior employees through other methods of reduction in force." Without a foundation to indicate the basis for Browne's information, we doubt the admissibility of such a generalization about the bank's intentions[7] and therefore the

[7] Fed. R. Evid. 701 provides:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b)

appropriatness of considering the Browne affidavit on summary judgment.[8]

Our role, of course, is not that of factfinder — we are not to weigh the evidence or make credibility judgments. Moreover, we are required to view the evidence in the light most favorable to the plaintiff. Our task, more simply stated than accomplished, is to review the record before us to determine whether a genuine issue of material fact exists for trial. However, as we held in *De Artega* v. *Pall Ultrafine Filtration Corp.*, 862 F.2d 940, 941 (1st Cir. 1988), "the question is not whether there is literally no evidence favoring the nonmovant, but whether there is any upon which a jury could properly proceed to find a verdict in that party's favor." Had plaintiff offered evidence of the statistical relevance of the Ellington sample, the conflicting affidavits might have been sufficient to create a genuine issue of material fact. Without more, plaintiff's affidavits provide at best a small sample of employment data, without any showing of the statistical relevance of the sample, and a series of vague statements and conjectures. We,

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helpful to a clear understanding of his testimony or the determination of a fact in issue.

The plaintiff has offered no information as to the specific observations upon which Browne's opinions are based. Neither are the opinions, as expressed in the affidavit, "helpful to . . . the determination of a fact in issue." Rather, the affidavit simply states Browne's opinion as to the ultimate issue, a determination which, as a lay witness, Browne is no more prepared to make than the trier of fact. *See Mitroff* v. *Xomox Corp.*, 797 F.2d 271 (6th Cir. 1986) (rejecting the opinion of a manager as to the existence of age discrimination and explaining that "seldom will be the case when a lay opinion on an ultimate issue will meet the test of being helpful to the trier of fact since the jury's opinion is as good as the witness'. . . "). 797 F.2d at 276.

[8] Fed. R. Civ. P. 56, relative to summary judgment, provides that:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters therein." Fed. R. Civ. P. 56(e).

The Browne affidavit thus fails on two counts: it does not set forth statements that would be admissible nor does it establish Browne's competence to testify to those statements.

therefore, hold that the plaintiff has not made a showing sufficient to survive summary judgment with respect to his age discrimination claim.

THE RETALIATION CLAIM

The facts plaintiff relies on for his retaliation count, which come from his own deposition and affidavit, are as follows. On May 30, 1986, Ingalls called plaintiff at home, while plaintiff was on vacation, and told him about the reorganization plans. When plaintiff inquired as to where he fit in to the new scheme of things, Ingalls responded that he did not fit in and that Toby Danforth, a bank official, would tell him what was going to happen on Friday (the next day). Danforth contacted plaintiff the next day and told him that he should go back to work on Monday and work until the 30th of June. Plaintiff was also told that as long as his work was up to date, he could use his office until June 30 for contacting prospective employers.

On June 2, plaintiff retained counsel. On June 11, he hand-delivered to Danforth a letter from his attorney stating that plaintiff intended to protect his rights regarding his termination. Immediately after delivering the letter, plaintiff was allegedly told by Danforth that because he had contacted a lawyer, "All bets are off." On June 13, Ingalls called plaintiff into his office and said, "Don't get lawyers involved. Let someone else pay the lawyers. You don't need a lawyer." On the afternoon of the same day, Ingalls ordered plaintiff to vacate his office and told him that he would have no further access to any office in the Bank. According to plaintiff, the reason Ingalls gave for evicting him from his office two weeks prior to the promised date of June 30 was:

> You're very popular with municipalities out there and with other banks, and people respect you and we don't want to lose any of our clients, and I feel I'd like to have

> you out of your office so we can put somebody else in there and get on with the workings of the department.[9]

Plaintiff's severance pay and other benefits were computed as of June 30. His pension had vested prior to the notification on May 31 that he would be discharged effective June 30. The only detriment to plaintiff as a result of the Bank's sudden eviction of him from its premises was the loss of the use of his office for a period of two weeks to contact prospective employers.

The retaliation provision of the ADEA provides in pertinent part:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment ... because such individual ... has opposed any practice made unlawful by this section, or because such individual ... had made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter. 29 U.S.C. § 623(d).

In order to establish a prima facie case of retaliation, plaintiff must show that: he engaged in conduct protected by the act; he was subjected to an adverse employment action at the time or after the protected conduct occurred; and there was a causal link between the protected conduct and the adverse employment action. *Wenty* v. *Maryland Cas. Co.*, 869 F.2d 1153, 1154-55 (8th Cir, 1989); *see also Oliver* v. *Digital Equipment Corp.*, 846 F.2d at 110-111; *Rowlett* v. *Anheuser-Busch, Inc.*, 832 F.2d 194, 202 (1st Cir. 1987).

It is self-evident that by retaining an attorney plaintiff had engaged in an activity protected under the Act. *See Grant* v.

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[9] This statement contradicts Ingalls' affidavit testimony that one of the reasons for discharging plaintiff was his poor performance as a municipal officer.

Hazelett Strip-Casting Corp., 880 F.2d 1564, 1569 (2d Cir. 1989); *Byers* v. *Follmer Trucking Co.*, 763 F.2d 599, 601-02 (3d Cir. 1985). And although the plaintiff's status at the time of the retaliatory action was that of an employee about to be terminated, he was protected under the Act. *See Rutherford* v. *American Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir. 1977) (employee has retaliatory claim against bank even though she voluntarily terminated her employment three months prior to retaliatory action which resulted in her not obtaining another job); *Wolf* v. *J.D. Case Co.*, 617 F. Supp. 858, 868 (D.C. Wis. 1985). (retaliation need not have occurred prior to plaintiff's termination).

The only question is whether the Bank's action, which was retaliatory, comes within the scope of the statute. Did it constitute "discrimination" against the plaintiff, or to put it another way, was it an adverse employment action? We think not.

Most cases involving a retaliation claim are based on an employment action which has an adverse impact on the employee, i.e., discharge, demotion, or failure to promote. Here it had been irrevocably decided that plaintiff would be discharged on June 30. He was discharged two weeks prior to that time but was paid in full to June 30, and all of his severance benefits were computed as of that date. Plaintiff has not alleged that he was damaged in any way by the Bank's action.

We have found one case almost directly on point. In *Miller* v. *Aluminum Co. of America*, 679 F. Supp. 495 (W.D. Pa.), *aff'd without opinion*, 856 F.2d 184 (3d Cir. 1988), plaintiff was informed in September that she would be discharged for poor performance at the end of December. In October she filed a complaint with the EEOC alleging sexual discrimination. On November 7, she was told not to report for work anymore. She received full employment benefits as if she had worked to her scheduled termination date. *Id.* at 504. The

court held that because plaintiff received her full benefits to the date of the original termination date there was no adverse employment action. *Id.* at 505.

In *Yates* v. *Avco*, 819 F.2d 630, 638 (6th Cir. 1987), a case relied on by the *Miller* court, it was held that a temporary demotion without reduction in pay or benefits did not ground a retaliation claim under the ADEA. The only other case we have found in the general target area is *Passer* v. *American Chemical Soc.*, 701 F. Supp. 1 (D.D.C. 1988). It held that the cancellation of a symposium honoring plaintiff was not retaliation as intended by the ADEA. *Id.* at 3.

We hold that although the Bank's peremptory discharge of plaintiff two weeks prior to the notified date could be found to be rataliatory, it was not an adverse employment action within the meaning or intent of 29 U.S.C. § 623(d).

SUMMARY

We affirm the summary judgment for defendants on Count I (discrimination claim) and Count II (retaliation claim); we remand to the district court with instructions to dismiss Count III because it is without statutory authority, and its allegations are subsumed in Count I. The dismissal of Counts IV and V have not been appealed.

Costs awarded to appellee.

Concurring Follows

TORRES, *District Judge* (concurring). I concur in Judge Campbell's conclusion that the district court's entry of summary judgment in favor of the defendant should be affirmed. However, I reach that result for different reasons that I think are important to express.

I agree that, in an employment [age] discrimination case, merely rebutting the employer's proffered reason for its adverse decision does not necessarily entitle an employee to a

judgment. As Judge Campbell has said, in order for an employee to prevail, "the evidence must ultimately be sufficient to permit the factfinder reasonably to infer that the plaintiff was fired because of his age." Slip op. at 13. In my opinion, that is an accurate restatement of the Supreme Court's requirement that an employee must prove the proffered reason to be a pretext *for discrimination*. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981).

Under *Burdine*, success in demonstrating that the proffered reason is not the real reason for the employer's action establishes its pretextual nature and raises an inference of a discriminatory purpose. In many cases, that may be sufficient for the employee to prevail. However, in some cases it may not because the pretext may be cloaking a *non*discriminatory purpose that the employer wishes to conceal. For example, an employer who fires a 41 year old employee, stating that the employee is unqualified, would not be guilty of age discrimination if the real reason was a desire to create a job for an unemployed relative.

Consequently, although I recognize that proof of pretext will often warrant a finding of intent to discriminate, I agree that an employee bears the ultimate burden of proving *both* that the employer's stated reason is pretextual *and* that it masks a discriminatory motive. However, I am troubled by the statement that, at the summary judgment stage, "even if plaintiff's evidence were sufficient to rebut the bank's stated reasons for his dismissal, the evidence overall has to be sufficient for a factfinder reasonably to infer that the Bank's actions were motivated by age animus." Slip op. at 17. If "to rebut" simply means to present evidence tending to disprove the *validity* or *soundness* of the stated reason, I agree that the employee must do more. The employee must also present evidence that the employer was motivated by a discriminatory purpose. *Medina-Munoz* v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990). That may be accomplished indirectly

by adducing facts indicating that the proffered reason was not the real basis for the employer's action. *Burdine*, 450 U.S. at 256. On the other hand, if "to rebut" means to present evidence that the employer was not genuinely motivated by its articulated reason, I do not believe that anything more is required.

As Judge Campbell has indicated, under the burden-shifting formula established by *Burdine*, the employer's articulation of a nondiscriminatory reason "nullifies the inference raised by the *prima facie* case." Slip op. at 4. Therefore, unless rebutted, the articulated reason is sufficient to carry the day for the employer because "[w]e do not second-guess the business decisions of an employer." Slip op. at 5. Alternatively, if the employee demonstrates that the proffered reason is pretextual, the *prima facie* case is reinstated and its inference of a discriminatory purpose may be considered along with any contrary evidence in determining whether the employer was motivated by an intent to discriminate. Otherwise, the employer's mere articulation of a patently specious nondiscriminatory reason, even if transparently disingenuous, would return the employee to the untenable position of having to prove discriminatory intent only by "smoking gun" evidence which is precisely what *Burdine* sought to avoid.

Whether an employee has presented sufficient evidence to support a reasonable inference that the proffered reason is pretextual may be properly determined at the summary judgment stage. In making that determination, it must be borne in mind that the employee is required to do more than simply dispute the articulated reason or question its wisdom. *Medina-Munoz*, 896 F.2d at 9; *Menard* v. *First Sec. Services Corp.*, 848 F.2d 281, 285 (1st Cir. 1988). As previously noted, it is not enough for the employee to challenge, or even disprove, the *validity* or *soundness* of the stated reason. The employee must present evidence warranting a finding that the employer was not genuinely motivated by that reason or that it was

motivated by a discriminatory animus. Although employment discrimination cases often require some assessment of how well an employee is discharging his/her duties or the business considerations confronting an employer, they should not be converted into trials to determine the level of an employee's job performance or the sagacity of an employer's business judgments. Thus, the relevant inquiry is not whether the articulated reason is factually correct but whether it really prompted the employer's action.

On the other hand, if the evidence is sufficient to support a finding of pretext, I believe that the additional question as to whether the inference of discrimination arising from the reinstated *prima facie* case outweighs whatever contrary evidence may exist is a quintessential question of fact that must be decided at trial unless there is uncontradicted evidence that the employer was really motivated by some other nondiscriminatory reason. In this case, no other such reason has been cited. The Bank has consistently maintained that Connell was terminated because of the reorganization and his job performance relative to those who were retained. Therefore, the issue is not whether the stated reason was a pretext *for discrimination*. Rather, it is whether Connell has presented sufficient evidence to support an inference that the reason was a *pretext*. In my judgment, he has not.

It is undisputed that changes in federal and state laws made the Municipal Finance unprofitable and that a reorganization occurred pursuant to which the unit was eliminated. Furthermore, Connell was not replaced. Rather, his job was eliminated as a result of the reorganization and those of his duties that continued to be performed were assumed by some of the remaining four officers in his unit who were transferred to other departments. Nor has Connell presented any evidence rebutting the Bank's contention that he was discharged because Ingalls considered him less qualified than the other officers in his unit. As Judge Campbell has noted, Connell's per-

formance ratings were consistently below those of all but one of the other officers, and Connell's immediate supervisor had communicated an unfavorable view of his performance to Ingalls.

Connell's argument that he was *satisfactorily* performing his job is inapposite. There is nothing to suggest that the reorganization was fictitious. On the contrary, it is undisputed that at least one other younger individual (i.e. Nicolosi) lost his job as a result of that reorganization. Consequently, the question is not whether Connell was doing *satisfactory* work. Instead, the question is whether his performance was equal or superior to that of the other four officers who were retained. Since the record does not support an inference that it was, Connell has failed to present a genuine issue of fact regarding the allegedly pretextual nature of the Bank's proffered reason. Accordingly, I concur in the conclusion expressed by Judge Campbell that the district court's judgment should be affirmed.

Concurring and Dissenting Follows

BOWNES, *Senior Circuit Judge* (dissenting and concurring). I dissent from the affirmance of the summary judgment on the age discrimination claim (Count I) and concur in the affirmance of the summary judgment on the retaliation claim (Count II).

My reason for dissenting on the age discrimination claim is that the majority has applied the wrong legal standard. At page 13 of the opinion, it is stated: "Besides rebutting the employer's proffered reasons for firing a plaintiff, the evidence must ultimately be sufficient to permit the factfinder reasonably to infer that the plaintiff was fired because of his age." The majority later concludes on page 17: "Moreover, even if plaintiff's evidence were sufficient to rebut the bank's stated reasons for his dismissal, the evidence overall has to be

sufficient for a factfinder reasonably to infer that the Bank's actions were motivated by age animus."

The requirement that a plaintiff rebut an employer's articulated reasons and also directly prove age discrimination is contrary to the express teaching of the Supreme Court. All that is necessary to raise a genuine issue of material fact in an employment discrimination case is that the plaintiff make out a prima facie case and successfully rebut as pretextual the employer's articulated reasons for the adverse action. As I shall demonstrate in more detail later, there can be little doubt that the plaintiff here has met this two-step test. That is all a plaintiff has to do to have a trier of fact consider his claim. There is no requirement that the plaintiff also prove that "the Bank's actions were motivated by age animus." I acknowledge that the majority has followed First Circuit precedent, but I believe that our precedent is contrary to the explicit teaching of *Texas Dep't. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). A review of the relevant Supreme Court cases is in order.

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973), is, of course, the seminal case on the order and allocation of proof in an employment discrimination case. The plaintiff carries the initial burden of establishing a prima facie case. If this is done, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* at 802. If the articulation is made, plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a [racially] discriminatory decision." *Id.* at 805.

In *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978), the Court explained the shifting burden as follows:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these

> acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. *See Teamsters* v. *United States*, *supra*, at 358 n. 44. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Id. at 577 (emphasis in original).

In *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, the Court, speaking through Justice Powell, the same Justice who had written *McDonnell Douglas*, further amplified and explained the *McDonnell* shifting burden. The Court reiterated the three *McDonnell* steps in an employment discrimination case, *id.* at 252-54, and then concluded its burden-shifting exposition by the statement that requires the elimination of the additional proof imposed by the majority on the plaintiff.

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas*, 411 U.S., at 804-805.

Id. at 256 (emphasis added). Neither the opinion of my brother Campbell nor that of Judge Torres' concurrence comes to grips with the alternative language of *Burdine*. They dance all around it, or simply ignore it.

The last case bearing directly on the issue is *United States Postal Serv. Bd. of Govs.* v. *Aikens*, 460 U.S. 711 (1983). In *Aikens*, the Court added some gloss to *Burdine:*

> Where the defendant has done everthing that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff." *Burdine*, *supra*, at 253.

Id. at 715. Justice Blackmun's concurrence restated the pertinent rule:

> While the Court is correct that the ultimate determination of factual liability in discrimination cases should be no different from that in other types of civil suits, *ante*, at 716, *the McDonnell Douglas framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason for the employment decision is in fact not the true reason for the employment decision.*

Id. at 718 (emphasis added). As I read the Supreme Court cases, especially *Burdine*, a plaintiff may prove employment discrimination *either* by direct evidence of discrimination *or* by successfully rebutting the employer's articulated reasons. For some reason this circuit requires a plaintiff to meet three requirements, not two, to forestall summary judgment. In addition to making out a prima facie case, a plaintiff has the

burden not only of proving that the articulated reasons of the employer were pretextual but also of adducing additional evidence of age discrimination:

> We have often discussed the interplay between the *Burdine* burden-shifting framework for proving age discrimination and the imperatives of Rule 56. *See, e.g., Menzel*, 848 F.2d at 328-30; *Menard*, 848 F.2d at 284-85; *Dea*, 810 F.2d at 14-16. Generally speaking, the principles discussed above abide at the summary judgment stage. Most pertinent for our purposes, it remains true that when, as here, the employer has articulated a presumptively legitimate reason for discharging an employee, the latter must elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer's real motive: age discrimination. *See generally Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-26, 106 S.Ct. 2548, 2552-54, 91 L.Ed.2d 265 (1986) (summary judgment opponent who bears burden of proof on an issue must reliably demonstrate existence of genuine dispute as to material facts); *Garside*, 895 F.2d at 48 (similar); Fed. R. Civ. P. 56(e).

Medina-Munoz v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990). Our rule violates the explicit alternative method of proof as stated in *Burdine*.

At least nine circuits have held that the *Burdine* alternative language means that making out a prima facie case *plus* proving that the articulated reason for the discharge was pretextual is sufficient, without more, to raise a genuine issue of fact as to discrimination. *See Ramseur* v. *Chase Manhattan Bank*, 865 F.2d 460, 464-5 (2d Cir. 1989) (summary judgment for employer reversed: "A showing that a proffered justification is pretextual is itself sufficient to support an inference that the employer intentionally discriminated."); *Fite* v. *First Tennessee*

Production Credit Ass'n., 861 F.2d 884, 890-91 (6th Cir. 1988) (employer's motion for directed verict properly denied because jury could have found that employer's reason for discharge was a mere pretext); *Samarzia* v. *Clark County*, 859 F.2d 88, 91-92 (9th Cir. 1988) (directed verdict properly denied; a reasonable jury could have concluded that employer's reasons were pretextual); *Overgard* v. *Cambridge Book Co.*, 858 F.2d 371, 375-76 (7th Cir. 1988) (plaintiff may prevail in one of two ways: either by directly proving that employer was more likely motivated by a discriminatory reason or by indirectly demonstrating that defendant's proffered reason for the termination is not credible. "If the plaintiff can convince the trier of fact that the defendant did not act for the reason it offers as justification, then the defendant has not met its burden and the plaintiff may thus prevail."); *MacDissi* v. *Valmont Industries, Inc.*, 856 F.2d 1054, 1057-59 (8th Cir. 1988) ("As a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred.") *Carden* v. *Westinghouse Elec. Corp.*, 850 F.2d 996, 1000 (3rd Cir. 1988) ("A showing that a proffered justification is pretextual is itself equivalent to finding that the employer intentionally discriminated"); *Sparks* v. *Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1562-64 (11th Cir. 1987) (summary judgment for employer reversed; employee raised a genuine issue of material fact as to whether employer's articulated reason for discharge was pretextual); *Thornbrough* v. *Columbus and Greenville R.R. Co.*, 760 F.2d 633, 646 (5th Cir. 1985) ("In the context of a summary judgment proceeding, the question is not whether the plaintiff proves pretext but rather whether the plaintiff raises a genuine issue of fact regarding pretext.") *Krodel* v. *Young*, 748 F.2d 701, 707-08 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985) (At very least *Burdine* and *Aikens*

"make clear that an ADEA plaintiff who has established a prima facie case and has effectively discredited the employer's proffered justification need not, in all cases, submit additional evidence concerning the particular employment decision at issue in order to demonstrate that age was a determining factor in the employer's action.").

The Fourth Circuit seems to follow the "additional" evidence test: "If the presumption is rebutted, the burden of production returns to the plaintiff to show that the defendant's proffered nondiscriminatory reasons are pretextual *and* that the employment decision was based on a sexually-discriminatory criterion." *Spencer* v. *General Elec. Co.*, 894 F.2d 651, 659 (4th Cir. 1990) (emphasis added). *Spencer*, however, was decided after trial, not on summary judgment. Hence, the plaintiff was given the opportunity to prove his case at trial, an option denied under the rule followed in our circuit. Our circuit seems to be the only one that puts an extra burden of proof on the plaintiff for avoiding summary judgment. It must be noted that neither of my brothers refers to a single circuit case outside of this circuit.

I now turn to an assessment of how the facts fit into the framework of the burden-shifting analysis. The majority finds two reasons for plaintiff's discharge: "the reorganization of the bank resulting in the elimination of the unit in which plaintiff worked and plaintiff's poor performance relative to his peers, particularly in regard to his work as a municipal account officer." Slip op. at 10-11. I agree with the statement of the first reason, but I think it more accurate to split the second statement in two. I would find three articulated reasons: bank reorganization, plaintiff's poor performance relative to his peers, *and* that plaintiff had mishandled two important municipal accounts.

I first consider the "reorganization" reason. Although not expressly so finding, the majority's analysis of the reorganization facts, slip op. at 12, effectively demonstrates that this reason had nothing to do with plaintiff's discharge. The elimi-

nation of the unit in which he had worked was accomplished by transferring virtually every employee, except plaintiff, to a new or pre-existing work unit. In fact, there was no reorganization, except as to plaintiff.

I have no quarrel with the majority's exposition of plaintiff's rebuttal of the "mishandling of municipal accounts" reason. Slip op. at 11-12. I do not know what more the plaintiff could have done to rebut this alleged flaw in his work. Not only did he submit specific affidavits of the municipal officers in charge of the alleged mishandled accounts stating their approval of plaintiff's performance, but the same bank official who had charged him with mishandling the municipal accounts also told plaintiff, after he had been discharged, that he was very popular with municipalities and other banks. Yet for some reason my brothers refrain from specifically finding that plaintiff successfully rebutted the municipal-accounts-mismanagement reason.

On the only proffered reason not rebutted conclusively, however, the majority finds that plaintiff "has not offered any evidence to show that the bank's other reason, his relatively lack-luster performance evaluations was pretextual." Slip op. at 16. I pass for the moment the question whether rebutting two out of three articulated reasons ought to be sufficient to surmount a summary judgment hurdle and focus on the performance evaluations. The phrase "lackluster performance evaluations" paints with too broad a stroke. The facts show that the bank evaluated plaintiff as a competent employee. Plaintiff started with the bank as a teller, then became a head note teller at a branch bank and finished his teller career as teller-in-charge at the South Boston branch. His performance appraisals ranged from fair to good.

Plaintiff was promoted to be an officer of the bank in 1978. We can fairly infer that the bank felt his performance as teller warranted this promotion. His performance evaluations as an officer varied from competent to commendable. He never

received an unsatisfactory or fair rating. Although plaintiff's evaluations did not mark him for the higher echelons of the bank, there is nothing in his employment record to suggest that he was not doing his work competently. It can be fairly argued that the job performance evaluation reason was, like the other two reasons, pretextual.

I disagree with the majority's analysis of the Ellington and Browne affidavits because I do not think my colleagues viewed them in the light most favorable to plaintiff. These affidavits are, however, beside the point; they should not enter the summary judgment mix. Under the law as set forth in *Burdine*, 450 U.S. at 256, plaintiff is entitled to have his claim of age discrimination determined by a trier of fact. He has successfully rebutted two of the three reasons for his discharge articulated by the Bank and raised a question of fact as to the third. This is sufficient, without more, to ground a finding that the Bank discriminated against plaintiff because of his age.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 88-1241-MA

THOMAS B. CONNELL,
PLAINTIFF,

v.

BANK OF BOSTON AND JOHN S. INGALLS,
DEFENDANTS

MEMORANDUM AND ORDER

MAZZONE, D.J. January 5, 1990

This employment discrimination case is before the Court on the defendants' motion for summary judgment. The plaintiff, Thomas Connell, has filed a five count complaint against the Bank of Boston, and John Ingalls, in his individual capacity, alleging the following: Count I alleges the Bank fired Connell in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 and its state counterpart, M.G.L. c. 151B; Count II alleges Connell was retaliated against in various ways for asserting an age discrimination claim; Count III alleges the Bank willfully violated the ADEA; Count IV alleges vioations of the covenant of good faith and fair dealings and Section 510 of ERISA; Count V alleges intentional infliction of emotional distress on the part of Ingalls. The parties have compiled a voluminous record from which the following essential facts can be culled.

The plaintiff was hired as a teller in 1963 and worked as a teller for the next 14 years. In 1977, he began to work as a municipal finance officer. On June 10, 1986, when he was terminated, he was one of 600 assistant vice presidents and a senior municipal finance officer in the Municipal Finance Unit, one of four units of the Public Finance Division of the Bank. It was the function of a municipal finance officer to provide financial advisory services to cities and towns and promote a deposit relationship. On April 7, 1986, the manager of Connell's unit recommended to Ingalls, the Managing Director of the Public Finance Division, age 36, that the unit be abolished because of its lack of profitability and its discouraging prospects. She recommended that some of the seven professionals of her unit be reassigned and other positions simply be eliminated. Ingalls reviewed the facts and figures and, on May 21, 1986, he decided to abolish the unit. At that time, there were 5 municipal account officers, of which Connell was one. Ingalls re-assigned 4 of the account officers and eliminated Connell's position as well as the position of the manager of Connell's unit. At the time, in relative terms, Connell's overall performance rating was the lowest of the five municipal finance officers. Ingalls also knew that the manager of the unit was dissatisfied with his performance. In June, 1986, Connell was 47 years old, had worked for the Bank for 23 years, was earning a salary of $36,000 and his pension rights were vested. In the overall picture, those officers retained within the division had better overall ratings, or had demonstrated special background and abilities. Five of those retained ranged from 42-57 years af age; four earned more than Connell; three did not have vested pension rights. When terminated, he received eleven months of severance pay based on his length of service. It would have been less costly for the Bank to terminate employees with less service. While Connell disputes his performance ratings, his personnel records from 1963 to 1968 show consistently below average ratings by his superiors.

Connell was not replaced as a municipal account officer. In January, 1988, the reorganized unit underwent a second reduction-in-force, and five additional officers were terminated, including one of the officers who had been reassigned in the earlier reorganization. In March, 1988, two more of Connell's former co-workers were laid off and Ingalls was also terminated. The work of the unit has been largely downgraded and the municipal advisory work is now done by the one remaining municipal account officer and it occupies only 20% of his time. In July, 1989, there were 9,542 persons employed by the Bank.

On that background of essentially undisputed facts, Connell has imposed his version of his 23 year performance at the Bank and his view of the actions taken by the Bank. He alleges the Bank, after considering early retirement programs, decided to let older workers go through reorganization rather than retirement and that the reorganization resulted in the termination of 95 employees, 75% of whom were over 40 years of age. He disputes his evaluations and alleges that he had additional duties not mentioned by the Bank. He disputes the Bank's stated reasons for reorganizing his unit, asserting that the Bank's practice in the 1980's was to strip the Public Finance Division of its profitable enterprises. Finally, he disputes every detail of his termination, including the disparate treatment he received, and points to the costs saved by the Bank by his termination as another basis of age discriminatory treatment.

The applicable law in an action brought under the ADEA when the case involves a reduction in force is clear. In order to establish a prima facie case of age discrimination in a case involving a reduction in force, a plaintiff must show that:

1. he was within the protected age group, that is 40-70 years of age;
2. he was fired (actively or constructively);
3. he was performing his job at a level that met his employer's legitimate expectation; and

4. the employer did not treat age neutrally or that younger persons were retained in the same position.

Hebert v. *Mohawk Rubber Co.*, 872 F.2d 1104, 1111 (1st Cir. 1989).

In this case, it is not disputed that Connell was in the protected age group, that he was terminated, and that some younger (and older) employees in the Division were retained. In its motion for summary judgment, the Bank takes the position that there is also no dispute that Ingalls, who made the decision to terminate Connell, regarded Connell's performance as the worst in his group and made the decision without regard to age, salary benefits or pension benefits.

The plaintiff, in his opposition to the motion for summary judgment, takes the position that: (a) Ingalls' articulated reasons for Connell's termination were pretextual, and (b) that the Bank's policies did not treat age neutrally. To avoid summary judgment then, the plaintiff must set out the disputed facts which would go to prove that Ingalls' reasons were pretextual and that the Bank's policies were not age-neutral. *Dea* v. *Look*, 810 F.2d 12, 15-16 (1st Cir. 1987). Merely stating that he disputes the reasons given by the Bank or Ingalls to terminate him is not sufficient to avoid summary judgment. *Menard* v. *First Security Services Corporation*, 848 F.2d 281 (1st Cir. 1988).

At the outset, I again note the role to be played by Local Rule 18 in summary judgment motions. The rule was intended to provide counsel with the framework for their presentations. The rule is especially helpful in employment discrimination cases because of the different questions presented and highly subjective views of both sides. *Stepanischen* v. *Merchants Despatch Transportation Corp.*, 722 F.2d 922, 928 (1st Cir. 1983). There has been a formalistic compliance with Local Rule 18 in this case, but the facts at issue do not coincide. The defendants have filed a comprehensive 41 paragraph statement

of undisputed facts. The statement supports their position completely. Of course, it is never difficult for the defendants, having all the necessary information immediately available to them to compile such an impressive record to support their position.

Usually, lacking in resources and access to basic information, the plaintiff generally must engage in investigation and discovery. The plaintiff here took numerous depositions of Bank officials and employees and received over one thousand pages of documentation as a result of discovery requests. Having amassed this record, the plaintiff prepared his opposition to the motion. Local Rule 18 states:

> Material facts set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties.

Rather than challenge all or even some of the 41 numbered paragraphs comprising the defendants' statement of undisputed facts, the plaintiff took a different tack, namely, the failure of the Bank to mention the role that early retirement programs played in its decision. He filed a 32 paragraph statement of disputed facts, many of which are not facts at all. Some statements merely dispute the Bank's stated reasons without providing any opposing facts and other statements do no more than point out what the Bank neglected to state. Some statements which might conceivably make a case for discriminatory treatment are based on the plaintiff's subjective views of certain events in the relevant years or ascribes a fact to "common knowledge," or "it appeared" to be a fact. I am left with a defendants' statement of undisputed facts which remain largely intact.

The plaintiff groups his facts under 5 headings; the parties,

the early retirement programs, the June, 1986 reorganization, the plaintiff's performance, and the intentional infliction of emotional distress. While the statement disputes the evaluation of his performance over 23 years and the events surrounding his termination, the immediate issue is whether his termination was the result of age discrimination, not whether his termination was an unfair or unwise business decision. *Gray* v. *New England Telephone and Telegraph Co.*, 792 F.2d 251, 255 (1st Cir. 1986). What the plaintiff offers to prove to support his age discrimination claim boils down to one theory and several "factual" allegations to support that theory. The theory is that the Bank had considered early retirement programs, but had abandoned them and had deliberately chosen instead to achieve the goal of eliminating the more senior employees through other reductions-in-force methods, thus limiting their future pension and medical benefits. To support this theory, the plaintiff alleges and offers to prove the following: the Bank had considered early retirement programs prior to 1968 but had never adopted one; "many" employees who would have been covered by early retirement were separated through reorganization of separate departments; that of 95 employees terminated in the three years, 1984-1986, 75% were over 40; that he was the oldest person in his unit; the Bank's denial of job posting process to senior, and thus, older employees; and the average age of the Bank's employees is 32.

After a review of the voluminous record, including depositions, affidavits and exhibits, I conclude the plaintiff has failed to produce any competent evidence that his termination was motivated by his age, or that the Bank's stated reasons were pretextual, or that the Bank's policies were not age-neutral. Much of what Connell offers as proof consists of self-serving, subjective assessments of the Bank's decisions, or assumptions, speculations, "common knowledge" or "understandings." Even if I were to consider those bald assertions, most have been totally negated by the record. For example, while the

plaintiff states that 75% of the 95 employees terminated in 1984-1986 were 40 years or older, a statement the plaintiff admitted was weak and incomplete, the *Lauer* affidavit demonstrates conclusively that 900 employees were involuntarily terminated during that period and less than 17% were over 40. Other statements, such as the *McManus* affidavit, which I accept as the truth, do not point to an age-motivated decision. The plaintiff is asking us to disbelieve Ingalls, but the undisputed facts relating to comparative ratings, salaries, job posting privileges, vested pension rights and ages show the Bank and Ingalls treated age in a neutral fashion. As stated earlier, the plaintiff has not effectively controverted the facts set out in the defendants' statement of undisputed facts, and has not presented any facts that would allow a factfinder to conclude the employer's reasons were a "coverup." *Monzel* v. *Western Auto Supply Co.*, 848 F.2d 281, 287 (1st Cir. 1988). In my judgment, the plaintiff has not presented evidence which would permit a jury to conclude that the abolition of his job flowed from other than legitimate business considerations. *Schuler* v. *Polaroid Corp.*, 848 F.2d 276, 281 (1st Cir. 1988). Accordingly, the defendant is entitled to summary judgment on the ADEA-based claims in Counts I, II and III.

The defendant is also entitled to summary judgment on Count IV and V. These non-federal claims need not be addressed because the only federal questions in this case are disposed of in Counts I, II, and III. However, these pendent state law claims do not require extended discussions. Counts IV and V are controlled, respectively, by persuasive authority which I believe to be applicable and dispositive. *Powers* v. *New England Telephone and Telegraph Co.*, C.A.No. 86-1839-S (D. Mass. May 31, 1988); *Presto* v. *Sequoia Systems, Inc.*, 633 F. Supp. 1117, 1121 (D. Mass. 1986).

In accordance with the foregoing the defendants' motion for summary judgment is allowed and the complaint is to be dismissed.

SO ORDERED.

s/ A. David Mazzone

United States District Judge

(2)

Supreme Court, U.S.
FILED
MAY 24 1991
OFFICE OF THE CLERK

No. 90-1646

In the
Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS B. CONNELL,
PETITIONER,

v.

BANK OF BOSTON AND JOHN S. INGALLS,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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25p.

QUESTIONS PRESENTED

Whether an employee in an age discrimination case presented competent evidence sufficient to create a material issue of fact concerning whether his employer's proffered business justification for his termination was pretextual.

Whether an alternative rationale adopted by only one of three Circuit Judges, each of whom wrote separate opinions, constitutes a holding of the case appropriate for review by this Court under a writ of *certiorari*.

Whether evidence which contests only one subsidiary component of an employer's business justification but which fails to contest the genuineness of the employer's asserted business motivation for terminating an employee precludes the entry of summary judgment for the employer.

Whether, assuming that an employee offers competent evidence to rebut one or more of the employer's business justifications for its conduct, it is error for the trial court to assess all of the evidence in the case to determine whether a jury could reasonably find for the plaintiff, rather than automatically to rule that summary judgment must be denied on the strength of the plaintiff's original *prima facie* case.

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BANK OF BOSTON AND JOHN S. INGALLS,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE[1]

Petitioner's statement of the case omits two critical matters. It does not disclose the fact that there was an undisputed, non-discriminatory reason articulated by Bank of Boston (the "Bank") for terminating the employment of Thomas D. Connell ("Connell"). Nor does it set out the very limited holding in the decision of the Court of Appeals for the First Circuit as to which *certiorari* is sought.

[1] Respondent concurs with the Rule 29.1 Statement contained in the petition.

The Bank presented evidence that Connell was terminated pursuant to a reorganization which involved the elimination of some jobs, and because Connell's supervisor, John S. Ingalls ("Ingalls"), the division manager, believed him to be the worst performer among the five account officers in his unit (App. A-7, B-2). In reaching that conclusion, Ingalls took into account (1) Connell's performance ratings, (2) the fact that the unit manager, Connell's direct supervisor, did not have a favorable view of Connell's work, and (3) his belief that Connell had mishandled two specific accounts (App. A-7-8). Connell, in his opposition to the Bank's motion for summary judgment, disputed only the third subordinate reason (App. A-9, B-6-7).

At the time of his termination, Connell was one of six hundred assistant vice presidents at the Bank (App. B-2). He also was one of five municipal finance officers in the Municipal Finance Unit (App. B-2). During his tenure with the Bank from 1963 to 1986, Connell had on several occasions received negative performance reviews or reviews with negative comments to which he had taken exception.[2]

Less than two months before Connell's discharge, the manager of the Municipal Finance Unit recommended to Ingalls that the unit be abolished because of lack of profitability and

[2] The District Court's opinion reprinted at B-1 in the Appendix to the petition for *certiorari* contains a printing error at page B-2. The opinion, in fact, states: "While Connell disputes his performance ratings, his personnel records from 1963 to 1986 [not "1968" as reprinted at B-2] show consistently below average ratings by his superiors." Connell's assertion in his petition at 3 that he had received "good evaluations" "throughout his employment" is incorrect. Connell's performance reviews and his contemporaneous memoranda objecting to those reviews were in the Record Appendix ("R.A.") before the Court of Appeals. R.A. 429-75. Twice Connell had received composite reviews marked "unsatisfactory" and threatening termination unless significant improvement occurred. R.A. 436-38, 440-46. Although Connell routinely complained about the negative comments in his reviews, including his Unit Manager's last two reviews of his performance, R.A. 464, 469-70, 475, he did not contend below that the reviews were age-biased. *See* App. A-6 n.4 ("It is not our function, however, to evaluate job appraisals where there is no evidence that they were motivated or slanted by age animus.").

discouraging prospects and that various positions be eliminated, including her own (App. B-2). After reviewing the matter, Ingalls decided to disband the unit (App. B-2). Ten days later, Connell was told that he would be laid off in thirty days (App. A-17). No bank officer was hired to replace Connell (App. 10). Connell's work was split up among the remaining officers, who were re-assigned (App. A-8). One other individual, age 32, also was discharged as part of the reorganization and the unit manager (whose job also was eliminated, and who also was younger than Connell) subsequently left as well (App. A-8).

Connell's job performance was — it is undisputed — weaker than that of the four other municipal account officers retained (App. A-7, A-10, A-23-24, B-2). First, he had the lowest overall performance rating (App. A-7, A-24).[3] Ingalls also knew that the unit manager was not satisfied with Connell's performance (App. A-7, A-24, B-2). A few months earlier, Connell had refused to agree to goals established for him by the unit manager (App. A-7). She told Connell he should agree to the goals or resign, and communicated her displeasure with Connell to Ingalls, stating that "it is very important that you back me up." (App. A-7-8.)

Connell's pension rights were vested and he received eleven months of severance pay based on his length of service (App. B-2). It would have been less costly for the Bank to have terminated any one of the four younger account officers with less service (App. B-2).

Faced with the unchallenged evidence that Connell's termination was the result of a layoff occasioned by a business reorganization and that his job performance was weaker than that of all the retained officers, the United States District Court for the District of Massachusetts allowed the motion for sum-

[3] The only individual who received the equivalent numerical rating had more favorable accompanying comments (App. A-7, A-10).

mary judgment. The District Court credited an affidavit challenging Ingall's assertion that a bank customer had complained to him about Connell, but in view of the remaining undisputed facts, it found that dispute to be immaterial (App. B-7).

The Court of Appeals for the First Circuit affirmed the District Court. There were three opinions. Judge Campbell found that there was no evidence that the Bank's stated reliance on its reorganization and Connell's relatively poor performance as the reason for his dismissal was pretextual (App. A-14). The opinion goes on to hypothesize that "*even if* plaintiff's evidence were sufficient to rebut the bank's stated reason for his dismissal, the evidence overall has to be sufficient for a factfinder reasonably to infer that the Bank's actions were motivated by age animus," and he found that plaintiff had not met that burden (App. A-14) (emphasis added). Judge Torres concurred only with the finding that plaintiff had not shown that the employer's articulated reasons were pretextual (App. A-24). His concurring opinion stated his belief that if the evidence had been sufficient to support a finding of pretext, then the plaintiff's *prima facie* case would have been reinstated and would present a "quintessential question of fact that must be decided at trial. . . ." (App. A-23.) In his dissent, Judge Bownes disagreed both with the evidentiary finding that plaintiff had not shown that the Bank's reasons were pretextual and with the legal proposition that a rebuttal of the employer's reasons may in some cases be insufficient to defeat a motion for summary judgment. The only holding of the case, then, is that Connell did not demonstrate that the Bank's reasons for terminating him were a pretext for a discriminatory reason.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I. Petitioner Seeks Review Of The Evidentiary Determination That He Failed To Rebut The Business Justification For His Termination.

In order to reverse the judgment entered below, this Court would be called upon to find error with the evidentiary determination made by two lower courts that Connell failed to rebut the business justification proffered by the Bank for his termination. For that reason alone, a writ of *certiorari* should not be granted. *See United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a *certiorari* to review evidence and discuss specific facts."); *National Labor Relations Board* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident to grant cross-petition for writ of *certiorari* that presented primarily a question of fact, "which does not merit Court review."); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508 (1924) (dismissing *certiorari* on ground that case primarily concerned a question of fact). *See also Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of very obvious error.").[4]

Connell does not dispute that the lower courts properly articulated the first three steps of the burden-shifting analysis used in employment discrimination cases. That analysis required Connell first to present a *prima facie* case of age discrimination. *Texas Dep't. of Community Affairs* v. *Burdine*,

[4] See *also Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441 (1918); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924).

450 U.S. 248, 252-53 (1981), *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).[5]

Once a *prima facie* case was stated, the burden of production shifted to the Bank to articulate a nondiscriminatory justification for its decision. *Burdine*, 450 U.S. at 253. The business justification proffered by the Bank for Connell's termination was that: (1) Connell's unit was abolished and some employees laid off because of its lack of profitability; and (2) Connell's performance was the weakest in his group as evidenced by the fact that: (a) Connell's overall performance rating was the lowest of the five municipal finance officers; (b) Connell's immediate supervisor was dissatisfied with his performance; and (c) the defendant Ingalls believed Connell had mishandled two specific municipal accounts (App. B-2).

Connell does not dispute that the Bank articulated a satisfactory business justification for its conduct. Nor does he dispute that as a consequence it fell to him to "demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover up for a discriminatory decision," *McDonnell Douglas*, 411 U.S. at 805, *i.e.*, "that the proffered reason was not the true reason for the employment decision." *Burdine*, 411 U.S. at 256 (Petition at 6).

What Connell does dispute, however, is the evidentiary determination made by both lower courts that he failed to raise a material issue of fact concerning the genuineness of the business justification proffered by the Bank. That inherently factual — and dispositive — determination was made in the first instance by the District Court on the basis of the affidavits, exhibits and deposition testimony submitted by the Bank, the paucity of competent evidence offered by Connell, and the

[5] As discussed *infra*, the lower courts would have been warranted in finding that Connell had failed to present a *prima facie* case in this, a reduction in workforce situation, thus providing an independent ground for the denial of his petition.

Court's application of the Massachusetts District Court's Local Rule governing summary judgment presentations. As the District Court explained:

> Local Rule 18 states:
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> Material facts set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties.
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> Rather than challenge all or even some of the 41 numbered paragraphs comprising the defendants' statement of undisputed facts, the plaintiff took a different tack, namely, the failure of the Bank to mention the role that early retirement programs played in its decision. He filed a 32 paragraph statement of disputed facts, many of which are not facts at all. Some statements merely dispute the Bank's stated reasons without providing any opposing facts and other statements do no more than point out what the Bank neglected to state. Some statements which might conceivably make a case for discriminatory treatment are based on the plaintiff's subjective views of certain events in the relevant years or ascribes a fact to "common knowledge," or "it appeared" to be a fact. I am left with a defendants' statement of undisputed facts which remain largely intact.

(App. B-5.)

In particular, Connell's opposition to summary judgment failed to offer any competent evidence disputing the genuineness

of the Bank's asserted justification for its conduct — that Connell was the weakest performer of the five account officers in an unprofitable unit being abolished for economic reasons. At bottom, his petition seeks review not of any legal ruling but of that well-documented evidentiary conclusion and therefore should be denied.

The evidentiary straw man set up by Connell relies upon the affidavit of the defendant Ingalls which stated that in addition to Connell's poor performance ratings relative to his peers and the criticism of him by his immediate supervisor, Ingalls also was unhappy with the way in which Connell handled two specific municipal accounts. With respect to one of those accounts, the City of Lynn, Ingalls stated that the City treasurer told him that "if Connell was returned to the City's account, the City would no longer use the Bank as its financial advisor." (App. A-8.) In response, Connell submitted an affidavit of the City treasurer denying that he had told Ingalls that he "would move the account to another bank" if Connell were assigned to the account. The Ingalls affidavit, however, had said nothing about the City threatening to terminate its entire deposit relationship with the Bank but spoke only of a concern that the Bank's services as a financial advisor would be terminated if Connell was returned to the Lynn account. *Compare* App. at B-2 ("It was the function of a municipal finance officer to promote financial advisory services to cities and towns *and* promote a deposit relationship." (emphasis added)). Thus, the Lynn treasurer's affidavit did not in fact rebut Ingalls' statement.

The second affidavit cited by Connell in his petition is that of the treasurer of Northbridge, the other town about which Ingalls was concerned. The Northbridge affidavit is even more deficient, however, in that it failed even to suggest that Ingalls did not genuinely believe that Connell had mishandled that account. As an evidentiary matter, therefore, Connell failed to

offer competent evidence rebutting any of the Bank's asserted business reasons for his layoff.[6]

Although the Court of Appeals acknowledged that the two treasurers' affidavits may have countered one subsidiary element of Ingalls' justification for Connell's termination, it correctly concluded that Connell still had failed to offer any competent evidence tending to prove that the corporate reorganization was not bona fide or that his poor performance relative to his peers was not the reason for his layoff. In that circumstance, entry of summary judgment is correct, because it only is when "*all* legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions [that] it is more likely than not the employer [discriminated]." *Furnco Construction Co.* v. *Waters*, 438 U.S. 567, 577 (1978) (emphasis added). *See also Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977) ("Elimination of these *reasons* for the refusal to hire is sufficient, *absent other explanation*, to create an inference that the decision was a discriminatory one.") (emphasis added).[7]

In sum, the lower courts correctly concluded that Connell failed to offer competent evidence to rebut the business reason advanced by the Bank for his termination. Connell's desire to rehash the sufficiency of his evidence before a third court should not be made fodder for a writ of *certiorari*.

[6] The Northbridge affidavit acknowledges Ingalls' basic concern that the town's bond issue had been delayed beyond the effective date of the Tax Reform Act, but holds Connell blameless for the delay. It simply does not contradict Ingall's statement that he believed Connell accountable for that delay (App. A-10).

[7] Connell does not contend that merely rebutting one of several reasons serves to establish pretext, or that there is a split among the circuits on that question. *See, e.g., Sims* v. *Cleland*, 813 F.2d 790 (6th Cir. 1987) (falsity of one alternative and independent non-discriminatory reason does not warrant a finding of pretext as to all articulated reasons); *Logue* v. *International Rehabilitation Associates*, 837 F.2d 150 (3d Cir. 1988) (refusing to infer that falsity of one reason necessarily justified finding remaining reasons pretextual). Nor do any of the Circuit Court of Appeals cases cited by Connell stand for the proposition that evidence which tends to rebut just one subsidiary component of an employer's justification but which leaves intact the justification as a whole precludes the entry of summary judgment.

II. The Petition Seeks A Writ Of Certiorari To Review A Question Not Raised By The Holding Of The Court Of Appeals, Nor Even Raised By The Dicta To Which Petitioner Objects.

Both Circuit Judge Campbell in his opinion for the Court of Appeals and Judge Torres in his concurrence expressly found that Connell failed to offer competent evidence that the Bank's justification for terminating Connell was pretextual (App. A-14 and A-23). Judge Torres wrote separately to stress that while he concurred with that conclusion, he did not subscribe to Judge Campbell's description of the task before the trial court *if* a showing of pretext is made (App. A-24). The limited holding of the case, therefore, is simply that on the facts presented Connell failed to offer competent evidence of pretext.

Connell's petition nevertheless seeks review of an entirely different and unnecessary question — nowhere presented even in dicta in Judge Campbell's or Judge Torres' opinions — namely, whether an employee "must 'rebut an employer's articulated reasons and also directly prove age discrimination. . . .'" (Petition at i, quoting from Judge Bowne's dissent at App. 25.) The petition thus first erroneously assumes that Connell indeed had presented an issue of fact as to pretext, and then goes on to ascribe falsely to the Court of Appeals a holding that notwithstanding proof of pretext, a plaintiff must also "directly prove age discrimination." *Id.*

That contention is untenable given Judge Campbell's admonition that:

> We do not suggest that the plaintiff must, necessarily, offer affirmative evidence of age animus in addition to rebutting the employer's evidence. Rather, the evidence as a whole, *whether direct or indirect*, must

> be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by age animus.

(App..A-4 n.3) (emphasis added). Viewed fairly, the principle advanced by Judge Campbell is that once an employee presents a genuine issue of material fact as to pretext, the court must look to the facts which gave rise to the original *prima facie* case, the plaintiff's evidence of pretext, and any additional evidence in order to determine whether there is sufficient evidence for a reasonable trier of fact to render a finding for the plaintiff (App. A-16). In Judge Campbell's words:

> Proof along these lines need not be of the "smoking gun" variety and, in some factual settings, the mere showing of the falsity of the employer's stated reasons may, along with the other facts and circumstances in the case, give rise to a reasonable inference of age discrimination. But this is not a matter that can be addressed by formula. For a plaintiff to prevail on his ultimate burden, the totality of the circumstances must in each case create a reasonable reference that the employer's reasons were *a pretext for unlawful* [*age*] *discrimination*. *Burdine*, 450 U.S. at 256.

(App. A-11) (emphasis in original). Thus, the petition's contention that Judge Campbell would require a plaintiff to "directly prove age discrimination" is flatly wrong.

Further, the language in Judge Campbell's opinion which apparently gives rise to Petitioner's concern is, in any event, not part of the holding of the Court of Appeals (App. A-23). The question on which Judge Campbell and Judge Torres appear to differ, fairly posed, is whether the plaintiff's tender

of evidence that the employer's proffered justification for its actions is pretextual serves automatically to resurrect the *mandatory* inference of discrimination that adhered to the original *prima facie* case and thus to require a trial in all cases — as Judge Torres believes[8] — or whether the trial court, even in that circumstance, should look to the totality of the evidence, including whatever inherent probative value the *prima facie* case retains, to determine if an inference of discrimination exists which warrants a trial — as Judge Campbell believes.[9]

That hypothetical question may be of interest, but it is not one presented by the holding in the case below. Thus, even were Connell to have described fairly Judge Campbell's opinion, he would be seeking *certiorari* review of pure *dicta*. In fact, Connell's petition actually seeks review of a proposition of law that was expressly rejected by all three judges below, none of whom would require a plaintiff to "directly prove age discrimination" in any circumstances.

III. The *Dicta* Challenged By Petitioner Is A Correct Statement Of Law And Is In Harmony With The Law In Other Circuits.

When stripped of the hyperbole attached to it by Connell, Judge Campbell's *dicta* emphasizing that "the evidence must

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[8] "[T]he additional question as to whether the inference of discrimination arising from the reinstated *prima facie* case outweighs whatever contrary evidence exists is a quintessential question of fact that must be decided at trial. . . ." (App. A-23.)

[9] "Besides rebutting an employer's proffered reasons for firing a plaintiff, the evidence must ultimately be sufficient to permit the factfinder reasonably to infer that plaintiff was fired because of his age. . . . [E]ven if plaintiff's evidence were sufficient to rebut the Bank's stated reasons for his dismissal, the evidence overall has to be sufficient for a factfinder reasonably to infer that the Bank's actions were motivated by age animus." (App. A-10-11, 14.)

ultimately be sufficient to permit the factfinder reasonably to infer that the plaintiff was fired because of his age" is nothing more than a distillation of Supreme Court precedent governing the burden of proof in employment discrimination cases. Judge Campbell's view that after considering the preliminary finding of a *prima facie* case, the employer's articulation of its non-discriminatory reasons for its action, and the plaintiff's attempt to demonstrate pretext, a court should examine all of the evidence in the case in order to determine whether a jury reasonably could find for the plaintiff is entirely consistent with the opinions of this Court.

The notion that a court should ignore the realities and vagaries of the record before it in favor of the false security provided by strict burden shifting formulas and rising and falling *prima facie* cases was rejected by *Burdine*:

> In saying that the presumption [arising from the *prima facie* case] drops from the case [upon assertion of a business justification], we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a *prima facie* case. A satisfactory explanation by the defendant destroys the legally mandated inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Burdine, 450 U.S. at 255 n.10. (emphasis added).

Similarly, in *United States Postal Services Board of Governors* v. *Aikens*, 460 U.S. 711, 714-15 (1983), the Court stated that once the employer articulates its reason for its actions,

> the *McDonnell-Burdine* presumption "drops from the case," and "the factual inquiry proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255.
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> * * *
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> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff." *Burdine*, *supra*, at 253.

See also Furnco, 438 U.S. at 577 ("The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic.").

The need to assess all of the evidence, direct and indirect, to determine whether a factfinder might reasonably conclude that the employer intended to discriminate is especially important in reduction in workforce cases, such as here, where the ultimate question is not whether the plaintiff was doing satisfactory work but whether his performance was equal or superior to those of his fellow employees who were retained (App. A-24). Indeed, several courts have held that for a plaintiff in a reduction in workforce case to establish a *prima facie* case he must, among other things, produce circumstantial or direct evidence sufficient to enable a factfinder to reasonably conclude that the employer intended to discriminate, *Matthews* v. *Allis-Chalmers*, 769 F.2d 1215, 1217 (7th Cir. 1985); *Williams* v.. *General Motors Corp.*, 656 F.2d 120, 128-29 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), *e.g.*, by proving

that the employer retained less qualified junior employees. *Samarzia* v. *Clark County*, 859 F.2d 88, 91 (9th Cir. 1988); *Dorsch* v. *L.B. Foster Co.*, 782 F.2d 1421, 1424 (7th Cir. 1986). Connell's utter failure to adduce such evidence thus also would have warranted dismissal of his claims for failure to establish a *prima facie* case, an independent ground for denying his petition for a writ of *certiorari*.

A considered review of those cases from other circuits cited by Petitioner as in conflict with Judge Campbell's views reveals that those courts either expressly or implicitly also decide employment discrimination cases based upon the inferences which properly may be drawn from the totality of evidence before them, and not through an unthinking deference to the plaintiff's original *prima facie* case.[10] There is, therefore, no

[10] *See, e.g.*, *Krodel* v. *Young*, 748 F.2d 701, 706 (D.C. Cir, 1984) ("The district court, by contrast, concluded that [plaintiff] could prevail by demonstrating that the [defendant's] explanation was a sham and by offering additional evidence of age discrimination [by the defendant]. We conclude that the district court's approach is entirely correct.") (emphasis added); *Samarzia* v. *Clark County*, 859 F.2d 88, 91 (9th Cir. 1988) ("The *other evidence* of intentional discrimination includes [plaintiff's] supervisor's (and coworkers') references to him as the 'senile' intake officer and his supervisor's expressed expectation that [plaintiff] would retire soon.") (emphasis added); *Sparks* v. *Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987) (evidence included sexual harassment by supervisor); *MacDissi* v. *Valmont Industries, Inc.*, 856 F.2d 1054, 1959 (8th Cir. 1988) (a discredited explanation "*may* persuade the finder of fact that such unlawful discrimination actually occurred.") (emphasis added); *Carden* v. *Westinghouse Elec. Corp.*, 850 F.2d 996, 1004 (3d Cir. 1988) (although evidence that supervisor told plaintiff the company wanted someone younger was held inadmissible, evidence which rebutted employer's sole business justifications for termination was held sufficient to require a trial); *Ramseur* v. *Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989) ("the plaintiff is not required to prove that the employer's proffered reasons are false but only that they were not the only reasons *and* that age made a difference") (emphasis added); *Overgard* v. *Cambridge Book Co.*, 858 F.2d 371, 376 (7th Cir. 1988) ("The plaintiff presented substantial evidence from which the jury could have found that the plaintiff's age was a determinative factor in the defendant's decision to terminate the plaintiff."); *Fite* v. *First Tennessee Production Credit Ass'n.*, 861 F.2d 884, 890 (6th Cir. 1988) ("The ultimate issue in this age discrimination suit is whether age was a determining

conflict among the circuits concerning the rejection of the type of mechanical, formalistic approach to a plaintiff's *prima facie* case advanced by Connell. Nor is there any basis whatsoever for Connell's suggestion that the First Circuit requires the plaintiff to offer "direct proof" of discrimination, or a "smoking gun," or to meet any other evidentiary threshold above what is required generally for a plaintiff to survive a summary judgment challenge.[11]

Accordingly, Judge Campbell's opinion is entirely consistent with this Court's holding that the standard for summary judgment is simply "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). *See generally Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984), ("Discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion."). Although the decision on a Rule 56 motion in a discrimination case may be aided by reference to the shifting production of evidence rules of *McDonnell Douglas* and *Burdine*, in the end the district court must determine not whether the dance steps have been followed, but rather whether there is evidence from whatever source adequate to enable a trier to find for the plaintiff. *Cf. Aikens*, 460 U.S. at 716 ("[N]one of this means that trial courts or reviewing

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factor in the employer's decision to fire appellee."); *Mitroff* v. *Xomox Corporation*, 797 F.2d 271, 278 (6th Cir. 1986) (affirming use of jury instruction which twice stated burden was on plaintiff to establish discrimination by a preponderance of the evidence); *Thornbrough* v. *Columbus and Greenville R. Co.*, 760 F.2d 633 (5th Cir. 1985) (employee's evidence which disputed that he was not an effective performer, that he was unqualified for remaining jobs, and that his position was part-time precluded the entry of summary judgment for employer).

[11] *See e.g., Hebert* v. *Mohawk Rubber Co.*, 872 F.2d 1104, 1114-15 (1st Cir. 1989) (reversing grant of summary judgment in age case based on circumstantial evidence of discrimination), cited with approval at App. A-3.

courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern the 'basic allocation of burden and order of presentation of proof,' *Burdine*, 450 U.S. at 252, in deciding this ultimate question [of discrimination *vel non*]."). Judge Campbell's opinion said no more than that.

IV. Connell's Construction Of The ADEA Would Frustrate Its Congressional Purpose.

In arguing that district courts should ignore the specific facts of cases before them and seek refuge in talsmanic, burden-shifting formulas, Connell ignores the most fundamental Congressional purpose of the Age Discrimination in Employment Act. The ADEA's *raison d'etre* is to sanction discrimination based upon age. *See generally Aikens*, 460 U.S. at 715 ("The 'factual inquiry' in a Title VII case is [whether] the defendant intentionally discriminated against the plaintiff."); *McDonnell Douglas*, 411 U.S. at 805 (plaintiff must show that reasons proffered by employer "were in fact a cover-up for a racially discriminatory decision"); *Burdine*, 450 U.S. at 256 (plaintiff has "ultimate burden of proving intentional discrimination"); *Furnco*, 438 U.S. at 578 ("plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination").

A formalistic approach to summary judgment dispositions only can frustrate the purpose of the ADEA, especially where a plaintiff's *prima facie* case is based, as it was here, on a showing of minimal competence and not on a showing that the employee performed as well or better than his retained peers. For example, as Judge Torres noted, if the rules were as

woodenly applied as Connell would have them be, an employer who terminated a 41 year old employee to make room for the employer's nephew would be forced to trial to defend a charge of age discrimination if it had originally offered an additional explanation for its conduct other than its nepotism, which reason then was rebutted by the employee. Although the employer's nepotism and subsequent attempted cover-up would be offensive, it would not and should not constitute age discrimination. Unless trial courts retain their discretion to evaluate the *prima facie* case and all of the other evidence before them in order to determine whether age discrimination in fact has occurred and not simply whether judicially-created burdens and inferences have been shifted or destroyed, the enforcement of the ADEA will have little to do with the eradication of age discrimination.

CONCLUSION

For each of the foregoing reasons, Respondents respectfully request that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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